

Assessing transgender asylum claims

Jhana Bach

It can be challenging for all asylum seekers to demonstrate that they are at risk of persecution but perhaps even more so for transgender applicants.

There are two main categories of gender identity: ‘normative’, where one’s biological sex and felt gender are in alignment, and ‘transgender’, where one’s felt gender differs from one’s biological sex. Though transgender issues are often lumped together with lesbian, gay and bisexual (LGB) ones, there are wide and often unrelated differences between sexuality, which refers to desire, and gender, which refers to identity. Like homophobia, transphobia is prevalent in many parts of the globe, even in countries where it is legal to be transgender.

Transgender identity often excludes people from the protections of citizenship in their country of origin, and puts them at risk of forced sterilisation or castration, ‘corrective rape’, domestic violence, forced sex work, institutionalised violence and even execution. In Europe, many countries require people to be sterilised before they can legally change gender.

One of the biggest challenges lies in authorities’ lack of awareness that gender is different from biological sex. ‘Transitioning’ is the outward process of publicly assuming one’s felt gender through clothing, behaviour, hormone use or surgery. In Indonesia, the national government recognises a transgender person only after s/he has undergone gender alignment surgery but people in the earlier stages of transition, or those with no desire for surgery, are unprotected. Many transgender people live in constant fear of discovery. In one case, an Indonesian couple in which the husband was in the process of transitioning were exposed as lesbians by neighbours and threatened with beheading by local religious police.

Even after reaching a receiving country, transgender asylum seekers continue to be

at risk. Research has identified transgender people as “particularly vulnerable to physical, sexual and emotional abuse within asylum detention centres and community-based single sex shared accommodation” and therefore “at a high risk of self-harm or suicide” during the asylum process.¹

The UK Border Agency’s training manual ‘Gender Identity Issues in the Asylum Claim’² (hereafter called the GII guidance) is primarily used to educate UKBA case officers in trans-related issues and in evaluating testimonies. The document describes types of persecution that trans people may face in their country of origin, the feasibility of internal relocation (moving the applicant to another part of her/his country rather than granting asylum in the UK) and relevant Conventions such as the 1951 Refugee Convention, the European Convention on Human Rights (ECHR) and the Equalities Act 2010. LGB and particularly transgender issues are complex yet caseworkers receive only one day of training on LGBT issues before being expected to make what in many cases may be a life or death judgment. The guidance is vague, open to misinterpretation, and often based on normative assumptions.

Proving gender identity

Applicants are expected to be able to identify as trans upon their first interview, in spite of the fact that asylum seekers may not be familiar with UK transgender terminology, and therefore may not know how to describe themselves to the UK Border Agency. It is also deemed “reasonable to expect the individual to give a detailed account of any incidents of persecution”, in spite of the fact that it can be immensely difficult for people to recount traumatic experiences. The GII guidance also advises that “it is reasonable to ask whether redress was sought and/to explore any reason

for not seeking protection”, ostensibly in order to help caseworkers build up a history of the applicant’s experiences. However, research has shown that in practice this requirement can become a barrier to successful applications, as border agents may decide someone who did not seek protection did not feel significantly threatened. While this may seem reasonable in the context of the UK, it is much less so in areas where police, other officials and even family members engage in the rape, torture or killing of trans people.

For trans claims, interviewers are instructed to “explore what the applicant is claiming to be their current gender identity and establish the range of behaviour and activities of life that inform or affect the individual’s gender identity, or how they are perceived”. The phrase “current gender identity” ignores the evidence base that many if not most trans people have felt their gender/sex variance since childhood. The reference to a “range of behaviour” is troubling in its evocation of essentialised norms (women do this, men do that), and its implication that in order to be legitimately trans, one has to behave in a certain way. Further, by focusing on how they are perceived by others, the guidance belies the lived experiences of many trans people, who state they have always felt themselves to be transgender, regardless of how they are outwardly perceived. At issue is the notion that in order to be transgender one must already be in transition, which is not the case. This goes against the experience of many trans people, as well as a substantial amount of trans theory that establishes gender identity as internal and disconnected from body morphology. In other words, ‘transitioning’ from one gender to another is less about ‘changing’ gender than ‘aligning’ the exterior with the interior.

The GII guidance also directs decision-makers to look for evidence of transitioning such as “some or all of the following personal, legal and medical adjustments: telling family, friends and colleagues; changing one’s name and/or sex on legal documents; dressing, behaving and/or

living as a different sex; hormone therapy; and possibly surgery.” By referring to practices which are common in the UK, the guidance neglects the fact that outward transitioning is often not socially, medically and/or legally possible in the applicant’s country of origin, and as such cannot be relied on as an indicator of felt gender.

Proving ‘well-founded’ fear

In assessing claims, the primary role of the decision-maker is to “assess objectively whether there are reasonable grounds for believing that the applicant ... would face persecution” if repatriated. The UKBA guidelines centre on whether the country of origin “takes reasonable steps to prevent the persecution or suffering” of trans people. The guidance acknowledges that while it may appear that a state which does not criminalise homosexuality or trans identity offers ‘reasonable’ protection, this is often not the case; however, there are no specific statutes about what constitute “reasonable grounds” or “reasonable steps”. Caseworkers are directed to “assess objectively whether there are reasonable grounds for believing that there would be a real risk of serious harm”, without a clear indication of what level of proof is required.

The GII guidance directs decision-makers to the Country of Origin Information (COI³) to determine grounds for asylum. However, COI is only updated periodically and there is little or no information on lesbians and trans people in most COI reports. One of the greatest risks to transgender asylum seekers is that the lack of trans-specific discrimination information is frequently taken as an absence of threat. One senior caseworker said, “I can’t see that there would be any circumstances where persecution of gay people would not be reported ... So you have to ask, if there’s no evidence that can be found anywhere, whether it actually exists at all.”⁴ For some countries the COI data is misleading. For example, some states, such as Iran, allow transsexual surgery as a forced method of preventing homosexuality rather than supporting trans identities, while

the claims of LGBT asylum seekers from countries considered generally safe, such as Jamaica, are often summarily denied.

COI is also used to establish whether a trans asylum seeker would be safe if they relocated internally. Relocation is based on the idea that a specific, local group is responsible for the persecution but in the case of transgender persons the agents of persecution typically are police and society at large, thus internal relocation is not likely to effect a significant improvement in conditions for trans people. In addition, there is no objective measure of what constitutes 'safety'.

While the GII guidance document goes some way towards attempting to capture the complex and varying nature of gender identity issues, these efforts are negated by a conflicting notion that trans status is something that can be tested and proven. This misapprehension is the cause of most of the hardships which the UKBA subjects

trans applicants to – from expectations of immediate, coherent evidence of persecution to reliance on incomplete COI and the burden of proving an internal feature of identity. And in turn this has allowed the UK government (and many others) to detain and 'fast track' LGBT asylum seekers in order to return people who have legitimate fears for their well-being to the site of their persecution.

Jhana Bach jhana_b@hotmail.com recently completed an MA in Gender and Women's Studies at Lancaster University and is a member of Lancaster University's Migrancy Research Group
<http://tinyurl.com/LU-migrancy-research-group>

1. Tim Cowen, Francesca Stella, Kirsty Magahy, Kendra Strauss and James Morton, 'Sanctuary, Safety and Solidarity: Lesbian, Gay, Bisexual, Transgender Asylum Seekers and Refugees in Scotland', 2011: p.13 www.gla.ac.uk/media/media_195792_en.pdf
2. <http://tinyurl.com/HomeOffice-gender-asylum-2011>
3. www.ukba.homeoffice.gov.uk/policyandlaw/guidance/coi/
4. Nathanael Miles, 'No Going Back: Lesbian and Gay People and the Asylum System', Stonewall, 2010: p.13 www.stonewall.org.uk/what_we_do/research_and_policy/2874.asp